OOI CHIN NEE

v.

CITIBANK BHD

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL SUIT NO: 22-435-2002]
8 JANUARY 2003

LAND LAW: *Sale of land - Assignment of property by borrower to financier - Strata title issued - Title registered in developer's name - Whether assignment absolute - Auction - Whether financier has unfettered right to sell property - Whether title must be registered in borrower's name and charged to bank before proceeding to auction - Whether bank must apply to court to foreclose - Rules of the High Court 1980, O 83*

BANKING: *Securities for advances - Assignment - Assignment of property by borrower - Strata title issued - Whether assignment absolute - Auction - Whether bank has unfettered right to sell property - Whether title must be registered in borrower's name and charged to bank before proceeding to auction - Whether bank must apply to court to foreclose - Rules of the High Court 1980, O 83*

The plaintiff purchased a parcel from a developer and obtained a loan from the defendant, a bank, to effect the purchase by way of a facility agreement. The plaintiff also signed a deed of assignment through which he surrendered all his rights over the said property to the defendant. Subsequently, the defendant sought to sell the said property by way of a public auction. The strata title to the said property was later issued and registered in the developer's name. The plaintiff contended that he had not been given any notice of the purported sale. Essentially, he applied to this court for an injunction to prevent the defendant from auctioning off the said property.

Held:

[1] The strata title that had been issued indicated that the property was registered in the developer's name, and not the plaintiff. By s. 4.05 of the deed of assignment, once a separate strata title had been issued, a statutory charge must be registered over the said property. And, O. 83 of the Rules of the High Court 1980 provides that the defendant must apply to court to foreclose. (p 555 c)

[2] Based on the documentation available, it could be concluded that an equitable charge existed between the plaintiff and the defendant. Unlike the Federal Court case of *PhilleoAlied Bank v. Bupinder*, the present facts denoted that there was an issue document of title but no registered charge. Therefore, in pursuance of their contractual rights, the plaintiff must get the property transferred to his name and then register a charge in the defendant's favour when there is an issue document title. In the present case, the defendant had clearly attempted to circumvent the said s. 4.05 by proceeding with the proclamation of sale. (p 555 d-g)

[3] Whether or not an agreement is an absolute one (not purporting to be by way of a charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument – Federal Court in *Nouvau Mont Dor*. Thus, s. 4.05 of the deed of assignment had clearly stated what the plaintiff ought to do, i.e. to take a transfer of the property and at his own cost execute a statutory charge in the form prescribed in the National Land Code in the defendant's favour upon the issuance of a registered document of title to the property. Once this is done, the defendant would have to apply to court to foreclose. (pp 555 h & 556 a)

[Plaintiff's application for injunction granted with costs in the cause.]

Case(s) referred to:

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 ***(refd)***

PhileoAllied Bank (M) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 ***(dist)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)
National Land Code, ss. 89, 91
Rules of the High Court 1980, O. 83
Strata Titles Act 1985, ss. 5(1), 16(6), 34(1)(a)

For the plaintiff - M Thayalan; M/s Thayalan & Assoc
For the defendant - Moira Toh Siew Ling; M/s Lim Cheng Poh, Lim & Rahim

[The defendant has filed an appeal vide Civil Appeal No: P-02-369-03]

Reported by M Maheswaran

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JUDGMENT

RK Nathan J:

Facts

By a sale and purchase agreement dated 10 August 2000, the plaintiff purchased
b a parcel known as A-19-B Taman Impian, Leader Garden, Pulau Pinang, situated on Lot No. 4200, Daerah Timur Laut, Tanjong Bungah, Pulau Pinang (together known as the said parcel) from Leader Garden Sdn. Bhd., the developer, at a purchase price of RM410,000. To effect the said sale the plaintiff obtained a loan of RM348,500 by way of a facility agreement dated
c 5 September 2000 from the defendant. Pursuant to a deed of assignment dated 5 September 2000, the plaintiff surrendered all his rights over the said property and the said land to the defendant. As the plaintiff needed a further loan of RM78,000 the defendant referred the plaintiff to a registered valuer who gave a written market value of the freehold interest in the said parcel at RM650,000.

d Somehow in August 2002 pursuant to the power granted under the deed of assignment, the defendant proceeded, by way of a public auction to sell the said parcel at a reserve price of RM480,000 on 21 August 2002. On 27 August 2002 the strata title to the said parcel was issued and registered in the name of Taman Leader Management Corporation. In the meantime the plaintiff also
e appointed his own valuers on 9 August 2002. The said valuers also valued the said parcel at RM650,000.

Case For The Plaintiff

It is the plaintiff's case that he had not been given any sufficient or reasonable
f notice of the said sale and that he only came to know of the Proclamation of Sale on or about 7 August 2002. The plaintiff also questioned how the defendant was able to decide that the sum of RM480,000 was to be the reserve price. The plaintiff pleaded that he was never served with any valuation report that had determined the reserve price, nor was he given any opportunity to challenge the said reserve price. So far as the plaintiff was concerned the value
g of the said parcel was RM650,000 pursuant to the earlier valuation. The plaintiff contended that setting the reserve price at RM480,000 was against all rules of natural justice and also contended that the defendant was in breach of its duty to exercise reasonable care in assessing and affixing the true market value.

h

Since the strata title has now been issued and registered in the name of the developer, the plaintiff contends that the defendant can no longer proceed with the auction of the said property.

i

The plaintiff therefore prayed for:

(1) an injunction to restrain the defendant or its agent from selling by way of public auction the said parcel at the reserve price of RM480,000;

(2) a declaration that the action of the defendant in issuing out a proclamation of sale to sell the said parcel at the reserve price of RM480,000 is against the rules of natural justice or in breach of the rules of equity;

(3) Damages

(4) Interests

(5) Costs

(6) Such further or other relief that the court deems fit and proper.

The Application

By way of a certificate of urgency, the plaintiff took out an application (encl. 3) and prayed for an interlocutory injunction; but in encl. 3 the plaintiff only asked for an injunction to restrain the defendant or its agent from selling the said parcel by way of a public auction. In the interlocutory injunction the plaintiff had prayed for a total ban on the sale whereas in the statement of claim, the prayer for an injunction was that the property be not sold at the reserve price of RM480,000.

Findings Of The Court

The plaintiff filed a supplementary affidavit and annexed a copy of the Strata Title registered in the name of Leader Garden Sdn. Bhd., the developer herein. The defendant filed an affidavit in reply and so I thought it was. However in perusing the said affidavit I find that one Andrew Ho Beng Teik contends that he is the vice president of the plaintiff and that he has been authorised by the plaintiff to affirm the said affidavit in reply on behalf of the plaintiff and he contends that the facts deposed to are within his own knowledge or based on information. Mr. Andrew can be held to be affirming a false affidavit when he contends that he is affirming the said affidavit on behalf of the plaintiff. I am surprised that Mr. Thayalan did not take this issue further. But just because the plaintiff did not raise objections it does not mean that this court must accept this affidavit in reply by Andrew Ho Beng Teik. I will ascribe this to an error on the part of the solicitors in not checking to see that the affidavit was affirmed by Andrew Ho Beng Teik on behalf of the defendant and not on behalf of the plaintiff. I must therefore reject the entire affidavit as unacceptable because Andrew Ho Beng Teik has alleged that he is affirming this affidavit on behalf of the plaintiff when he has no business to do so. Notwithstanding the fact that there is no challenge by the plaintiff himself to this affidavit, I reject the entire affidavit.

With this affidavit gone with the wind, there is no reply to the plaintiff's allegations. There is then a second affidavit filed by one Yuen Mun Yew. The same fiasco is repeated. Mr. Yuen Mun Yew says that he is the director of the plaintiff and is authorised by the plaintiff to affirm this second affidavit. On the reasons given earlier I am constrained to reject this affidavit too. At least if there had been an affidavit to rectify these errors by both the deponents even at this late stage I would have, in the interest of justice, acceded. But in the absence of an oral application even at trial to amend, it would seem that the defendant would want to continue to rely on affidavits which could stand to be labelled as false affidavits.

The law journals abound with exhortations by judges, urging solicitors to pay more attention to the preparation of their cases. If scant heed is given to such advice, then it is necessary for the courts to come down hard and to set high standards of practice so that with the opening up of our legal system, foreigners with heavy investments in this country, would be rest assured that the practice of law in this country is of a very high standard and is equal to the best in any part of the world.

Since I have rejected both the affidavits of the defendant, there is therefore no response to the averments of the plaintiff.

On the day fixed for hearing of this application, Mr. Thayalan informed the court that the auction fixed for 21 August 2002 was adjourned to 23 October 2002. On 23 October 2002 the auction proceeded but there were no successful bidders and the auction had been put to 20 November 2002 and that was why the plaintiff had proceeded by way of a certificate of urgency to have encl. 3 heard on 14 November 2002.

The Merits

Mr. Thayalan argued that once an individual title to the said parcel had been issued, the security cannot be enforced by way of a proclamation of sale. Section 5(1) and (2) of the Strata Titles Act 1985 read as follows:

> 5 (1) This Act shall be read and construed with the National Land Code as if it forms part thereof.
>
> (2) The National Land Code and the rules made thereunder, in so far as they are not inconsistent with the provisions of this Act or the rules made thereunder, or are capable of applying to parcels, shall apply in all respects to parcels held under strata titles.

This means that the provisions of the National Land Code ('the NLC') would apply to parcels given strata titles. If there is a need for express enunciation of this, s. 34(1)(a) of the Strata Titles Act 1985 states it clearly. It reads as follows:

> 34(1) Subject to this section and other provisions of this Act, a proprietor shall have:
>
> (a) in relation to his parcel, (in the case of a parcel proprietor) the powers conferred by the National Land Code on a proprietor in relation to his land;

Now it is necessary to look at s. 16(6) of the Strata Titles Act 1985. It reads as follows:

> 16(6) The provisions of ss. 89 to 91 of the National Land Code shall apply to documents of strata title as they apply to documents of final title.

Since s. 16(6) stipulates that the provisions of ss. 89 to 91 of the National Land Code shall apply to documents of strata title as they would apply to documents of final title, it is necessary to look at these sections. The said sections are reproduced herewith for ease of reference.

89. Conclusiveness of register documents of title

> Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence:
>
> (a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and
>
> (b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document.

90. Issue of issue documents of title

> (1) Where any issue document of title prepared under this Chapter is ready for issue to the proprietor of any land, the Land Administrator may serve on the proprietor a notice in Form 5F requiring him to attend in accordance with the terms of the notice, for the purpose of taking delivery of the document and paying any item of land revenue then outstanding in respect of the land.

(2) The Land Administrator shall require the receipt of any issue document to be acknowledged in such form as may be prescribed.

(3) Where any issue document is not collected by the proprietor or his agent pursuant to any notice under sub-section (1), it shall be retained by the Registrar or Land Administrator for issue in such circumstances, and upon payment of such fees, as may be prescribed.

91. Exemption of documents of title from stamp duty

It is hereby declared that no stamp duty is payable in respect of any document of title prepared under this Chapter.

Having considered the applicable law to this case, it is now necessary to look at cl. 8 of the sale and purchase agreement entered into between the plaintiff and the developer. Clause 8 reads as follows:

8. Separate strata title and transfer of title

(1) The vendor shall, at its own cost and expense, apply for subdivision of the said building so as to obtain the issue of a separate strata title to the said parcel under the Strata Titles Act 1985.

(2) Upon the issuance of the strata title to the said parcel and subject to the payment of the purchase price by the purchaser to the vendor in accordance with clause and the observance of all the terms and conditions herein provided, the vendor shall execute a valid and registrable memorandum of transfer of the said parcel to the purchaser, his heir or nominee or lawful assign, as the case may be.

Now it becomes necessary to look at s. 4.05 of the deed of assignment entered into between the plaintiff and the defendant on 5 September 2000. The said section reads as follows:

Section 4.05 **Execution of charge**

Upon the issue of separate document(s) of title to the property by the relevant governmental authorities, the assignor shall at its own cost and expense and immediately upon being so required to do so by notice in writing from the assignee or its solicitors take a transfer of the property and immediately deliver and deposit or cause to be delivered and deposited with the assignee or its solicitors the relevant document(s) of title and memorandum or memoranda of transfer and all other documents together

> with all necessary stamp and registration fees for effecting the registration thereof free from encumbrances and shall at the assignor's own cost and expense immediately execute a statutory charge or charges in the form prescribed under the National Land Code over the separate document(s) of title to the property such charges to be in form and substance prescribed by the assignee at its sole and absolute discretion in favour of the assignee to secure the repayment to the assignee of the facility not exceeding such principal amount as the *ad valorem* stamp duty from time to time stamped on the facility agreement extends to cover.

It seems clear from s. 4.05 that once a separate strata title had been issued, a statutory charge must be created over the said property. This means that the charge must be registered. Once this is established then O. 83 of the Rules of the High Court 1980 ('the RHC') stipulates that the defendant must apply to court for leave to foreclose. The strata title in respect of this property shows clearly that the said property is registered in the name of the developer. In other words it has not been registered in the plaintiff's name. Therefore it would seem that the present documentation as they exist show the existence of an equitable charge as between the plaintiff and the defendant.

In this respect it is very relevant to refer to the latest decision of the Federal Court in *PhileoAllied Bank (M) Bhd. v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621 at p. 626 where Abdul Malek Ahmad FCJ summarised the question to be answered by the Federal Court as:

> whether a lender may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is **no issue document of title and no registered charge**. (emphasis added).

In the case before me, there is an issue document of title but there is no registered charge. It is my judgment therefore that in pursuance of their contractual rights, when there is an issue document of title as in this case, the plaintiff must get the property transferred to his name and then register a charge in favour of the defendant/bank. The present conduct of the bank in proceeding with the proclamation of sale is clearly an attempt to circumvent s. 4.05 of the deed of assignment. In fact in *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] 2 CLJ 56; [1985] CLJ (Rep) 231 FC, the Federal Court held that whether or not an agreement is an absolute one (not purporting to be by way of a charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself. Therefore as in this case s. 4.05 of the deed of assignment clearly spells out what the plaintiff ought to do. He ought to, upon

the issuance of a registered document of title to the property, take a transfer of the property and at his own cost execute a statutory charge in the form prescribed in the NLC in favour of the defendant. Once this is done then the defendant will have to apply to court for leave to foreclose.

I therefore granted the plaintiff an injunction to restrain the defendant or its agent from selling the said property by way of a public auction and also ordered costs to be in the cause.